UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CW3 OWEN A. MCNIFF,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. A. No. 00-543 (RCL)**
	)	
LOUIS CALDERA, Secretary of the Army,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Now before the Court is a motion by the defendant to dismiss the plaintiff's complaint. The plaintiff, a white male, alleges that he was several times denied a promotion by the defendant's affirmative action policies. After a full consideration of the parties' pleadings, the applicable law, and for the following reasons, the Court GRANTS in part and DENIES in part the defendant's motion.

BACKGROUND

Owen McNiff is a white male and commissioned as a Chief Warrant Officer Three ("CW3") is the Regular Army. For three consecutive years, 1995, 1996, and 1997, he sought a promotion to the rank of Chief Warrant Officer Four ("CW4"). In each case, he was passed over. He now comes before this Court alleging that his lack of

promotion was due to various affirmative action policies.

I. The Army's Promotion Selection Boards

The Army promotes officers to the rank of Chief Warrant Officer Four through the use of "selection boards." *See* 10 U.S.C. § 573. Each year, this board reviews the experience and qualifications of several hundred officers seeking a promotion. The board selects the top candidates from the applicant pool and recommends them to the Secretary of the Army and ultimately the President for promotion to the positions available. *See* 10 U.S.C. § 571(b), 575. Although the President and the Secretary of the Army have the ultimate control over promotion decisions, it is understood by all involved that most, if not all, of the evaluative decisions are made by the selection board.

The Army generally seeks to staff its selection boards with a diverse array of officers. According to John Miller, Chief of the Management Support Division in the United States Total Army Personnel Command, the Army had a policy during 1995, 1996, and 1997 of "including, if available, at least two minorities and one woman on each selection board that considered candidates for promotion to the rank of CW4" Declaration of John Miller, May 15, 2000, at ¶ 8. In Officer McNiff's case, the 10-member selection boards considering his application did indeed contain officers of different races and sexes.

The board considering his 1995 application contained two minorities and one woman; the 1996 board contained four minorities and one woman; and the 1997 board contained two minorities and one woman.

McNiff alleges the policy of requiring "one or more females and one or more members of racial groups other than Caucasian [to be on the selection board]", and the *lack* of a policy requiring "one or more males and one or more members of the Caucasian racial group [to be on the selection board]" caused him to be passed over for a promotion in 1995, 1996, and 1997. Complaint for McNiff, Mar. 14, 2000, at ¶ 7. This, he argues, violates his Fifth Amendment right to equal protection.

II. The Army's Promotion Selection Process

The process used by the selection boards to choose candidates for promotion has changed several times in the past years. Indeed, it is unclear from the parties' pleadings what the exact terms of the process were during the years 1995, 1996, and 1997. Although the parties are not in complete agreement over the all aspects of equal opportunity policy at issue, the parties are in essential agreement that the policy, whatever its specific terms, amounted to a "revote" policy.

As its name suggests, the revote procedure occurs after the selection board has "completed a review of [the officers'] personnel

files and initially ranked [them] in order of qualification for promotion."[1] Brief for Defendant, May 17, 2000, at 2 (quoting *Sirmans v. Caldera*, 27 F. Supp. 2d 248, 249 (D.D.C. 1998) (Lamberth, J.)). After this ranking, the selection board reviews the results to determine whether promoting the leading candidates from the first ranking would "produce a selection rate for minorities and women that was comparable to the selection rate for all officers considered for promotion." Brief for Defendant, May 17, 2000, at 2. If promotions made in accordance with the initial ranking would *not* produce comparable promotion rates, the board was then obliged to reexamine the records of all female and minority candidates who were qualified for promotion yet unable to receive one on account of their ranking. The reexamination was "to determine if any of the personnel files show[ed] evidence of discrimination against the individual officer." *Id.* Selection Board members were to detect discrimination by

> Such indicators may include disproportionately lower evaluation reports; assignments of lesser importance and responsibility; or lack of opportunity to attend career-building military schools.

DA Memorandum 600-2, Nov. 26, 1993, at 13. If a majority of the selection board found "evidence of past discrimination, that officer

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[1] The Court notes that the procedures it summarizes herein are not seriously in dispute by any party. In fact, the "review and revote" policy challenged in this case is essentially the same as the one explained by this Court in *Sirmans v. Caldera,* 27 F. Supp. 2d 248, 249 (D.D.C. 1998).

was ‘revoted’ and assigned a new ranking.” Brief for Defendant, May 17, 2000, at 2. This new ranking may be higher or lower than the candidate’s first ranking and may not result in the candidate being ranked high enough for a promotion. In any event, the ranking ascribed to the female or minority applicant is final after the revote takes place.

Based on the content of the Army’s equal opportunity policy as well as the behavior of the selection boards, Officer McNiff alleges that the “review and revote” policy, in its requirement that minorities and women be granted an “adjust[ment] [in their] relative standing,” caused him not to be promoted in 1995, 1996, and 1997. The Court now considers this claim along with his claim regarding selection board membership.

ANALYSIS

I. Jurisdiction

Because the plaintiff’s well-pleaded complaint presents a federal question, this Court properly has jurisdiction under 28 U.S.C. § 1331.

II. Standard of Review

If a plaintiff has failed “to state a claim upon which relief can be granted,” a court may grant a defendant’s motion to dismiss.

Fed. R. Civ. P. 12(b)(6); *see also Hishon v. King Spalding,* 467 U.S. 69, 73 (1984); *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1114 (D.C. Cir. 2000). In evaluating a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States,* 617 F.2d 605,608 (D.C. Cir. 1979); *see also Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Wiggins v. Hitchens,* 853 F. Supp. 505, 508 n.1 (D.D.C. 1994) (citing 2A Moore's Federal Practice, § 12.07, at 63 (2d ed. 1986) (footnote omitted); *Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987)).

III. The Plaintiff's Claim Based on Selection Board Membership

The plaintiff alleges that he was denied a promotion three consecutive times because the Army had a policy of requiring women and minorities to sit on selection boards. The Court finds that the plaintiff lacks standing to pursue this facial challenge, and therefore that the claim must be dismissed under Federal Rule of Civil Procedure 12(b)(1) due to this Court's "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1).

Before analyzing the merits of the standing issue, it is

necessary to understand the exact nature of the plaintiff's case. The plaintiff's complaint is clear with regard to his allegation that the 1995, 1996, and 1997 selection boards discriminated against him. The plaintiff clearly has standing to bring this claim, and thus can be expected to rely on the racial composition of the selection boards in his case. Beyond this "as-applied" claim, however, the Court finds that the plaintiff is making a facial challenge to the defendant's policy on selection board membership.[2] It is on this claim that the Court finds the plaintiff to be without standing. The plaintiff's as-applied claim, whether it relates to selection board membership or not, may, of course, proceed despite the dismissal of

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[2] According to his complaint, the plaintiff challenges the defendant's "policies requiring that women and non-Caucasians, but not men and Caucasians, be seated as members of promotion selection boards." Complaint for McNiff, Mar. 14, 2000, at ¶ 28. As relief for this alleged constitutional violation, the plaintiff is seeking, inter alia, an order "[d]eclaring that the Army's policy [regarding selection board membership] violated the Fifth Amendment to the United States Constitution." *Id.* at 8. Because the gravamen of the plaintiff's allegation is not about "the manner in which [the policy] had been administered in practice" but about the policy itself, the Court regards his challenge as a facial challenge. *Bowen v. Kendrick,* 487 U.S. 589, 601 (1988). The correctness of this inference is supported by comparing the plaintiff's allegations on this issue with those on the review and revote issue. Unlike the board membership issue, the plaintiff does not challenge the official review and revote *instructions*, but rather challenges the actual "giving [of] special consideration . . . to non-Caucasians and women." Similarly, as relief for this conduct, he seeks an order declaring the equal opportunity instructions *and* the "*conduct* of the [selection] boards" unconstitutional. Thus, the plaintiff's challenge to selection board membership, when read in coordination with his other claims, is best read as facial.

his facial claim.

Article III standing rules ensure that parties will not "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 473 (quoting *United States v. SCRAP,* 412 U.S. 669, 687 (1973)). To this end, one of the requirements for standing is that there be "a causal relationship between the [plaintiff's] injury and the challenged conduct." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 663 (1993) (citations and internal quotation marks omitted) (analyzing a plaintiff's standing in an equal protection challenge to an affirmative action program); *see also Simon v. Eastern Kent. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976). This should not suggest, however, that one need show that the defendant's conduct was the *proximate* cause of the alleged injury. *See Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 72 (3d Cir. 1990) ("The "fairly traceable" requirement of the Valley Forge test is not equivalent to a requirement of tort causation."); *Loggerhead Turtle v. County Council of Volusia County, Fla.,* 148 F.3d 1231, 1251 n.23 (11th Cir. 1998). Rather, a plaintiff need only show that there is a "substantial likelihood" that the defendant's conduct caused the

plaintiff's injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 75 n.20 (1978).

Thus, the Court is posed with the question of whether there is a substantial likelihood that the Army's selection board membership policy caused the plaintiff's non-promotion. The Court finds that there is not such a likelihood. To hold otherwise would be to hold that every time "one or more females and one or more members of racial groups other than Caucasian" are placed on a selection board, the collective promotion decisions of the selection board are unavoidably altered. Such a conclusion would necessarily include two presumptions. First, that *all* women and non-whites have an inherent and unavoidable disposition to favor their own race and gender. And second, that all promotion decisions by selection boards are controlled by the voting habits of a few women and non-whites.

The first presumption is not just patently false, it is diametrically opposed to Supreme Court jurisprudence which this Court is bound to follow.[3] The Supreme Court has consistently shunned

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[3] Aside from Supreme Court jurisprudence, at least one court has considered the composition of a military selection board in an Equal Protection action. In evaluating whether the racial make-up of a particular selection board gave rise to an inference of discrimination, Judge Green recognized that "[t]here is a strong presumption that . . . selection board members faithfully discharge[] their duties." *Emory v. Secretary of the Navy,* 708 F. Supp. 1335, 1343 (D.D.C. 1989) (citing *Neal v. Secretary of the Navy,* 639 F.2d 1029, 1037 (3d Cir. 1981) (relying on a strong presumption of good faith in the conduct of Navy promotion selection boards)).

such racial and gender stereotypes, and, in any event, has never held that a decisionmaker's race or sex, by itself, prevents her from making an objective decision. *See, e.g., Bush v. Vera,* 517 U.S. 952, 986 (1996) ("Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."); *Georgia v. McCollum,* 505 U.S. 42, 59 (1992) ("[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party"); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"); *Powers v. Ohio* 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns"); *Holland v. Illinois*, 493 U.S. 474, 484, n.2 (1990) ("[A] prosecutor's 'assumption that a black juror may be presumed to be partial simply because he is black' . . . violates the Equal Protection Clause"); *Batson v. Kentucky,* 476 U.S. 79, 85, 104 (1986) ("[T]he Equal Protection clause forbids . . . the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.", "[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes.").

The second presumption behind the plaintiff's claim is completely devoid of logic. While it is reasonable to assume that women and non-whites, together with the other members of selection boards, inform the decisions of the board, it is patently unreasonable to assume that a few members, constituting a numerical minority of the board, can control the outcome of the board's decisions. Thus, even if women and non-whites were possessed of the class narcissism which the plaintiff implies, there is no reason to think they would be successful in converting the rest of the board to their views.

Of course, there exists the *possibility* (though it is a slight one for sure) that a particular woman or minority, possessed of both class narcissism and Machiavellian powers of persuasion, could pull off a coup of racial or gender discrimination against a particular applicant. But the mere possibility of this is a far cry from the necessity that, in a facial challenge, the plaintiff "establish that no set of circumstances exists under which the [policy] would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987); *see also Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514 (1990).

Nonetheless, as the preceding paragraph recognizes, just because the Court rejects the plaintiff's facial challenge does not mean that the selection board composition is irrelevant to the

plaintiff's discrimination claim. Indeed, the plaintiff in this case might, in accordance with his duty to demonstrate a discriminatory purpose under *Washington v. Davis,* 426 U.S. 229, 242 (1976), utilize the selection board membership, together with other evidence such as the promotion rate for certain races and genders, to persuade the Court that he has been discriminated against. In short, if the plaintiff was victimized by the Machiavellian narcissist, he can still pursue that claim.

IV. The Plaintiff's Claim Based on the Army's Equal Opportunity Policy

The plaintiff alleges that he was denied a promotion in 1995, 1996, and 1997 as a result of the Army's "review and revote" policy. This policy, he alleges, is unconstitutional. The Court finds that he has stated a claim upon which relief can be granted and therefore denies the defendant's motion to dismiss.

It is axiomatic in the era of notice pleading that a plaintiff need only provide "a short, plain statement of the claim" such that "the defendant [will have] fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, (D.C. Cir. 2000) (quoting Fed. R. Civ. P. 8(a)); *see also Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Thus, a complaint "need not plead law or match facts to every element

of a legal theory." *Krieger v. Fadely,* 211 F.3d 134, 136 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir.1998)); *see also Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.,* 148 F.3d 1080, 1086 (D.C.Cir.1998) ("[A] plaintiff need not allege all the facts necessary to prove its claim."); *Atchinson v. District of Columbia,* 73 F.3d 418, 421-22 (D.C.Cir.1996) ("A complaint ... need not allege all that a plaintiff must eventually prove.").

As Judge Easterbrook put it in the employment discrimination context:

> Because racial discrimination in employment is 'a claim upon which relief can be granted,'.... 'I was turned down for a job because of my race' is all a complaint has to say to survive a motion to dismiss under Rule 12(b)(6).

Sparrow, 216 F.3d at 1114 (quoting *Bennett*, 153 F.3d at 518).

The Court finds that the plaintiff has met this minimal threshold. Racial and gender discrimination in promotion are, of course, claims "upon which relief can be granted," and the plaintiff's statement that the defendant's racial and gender preferences denied him a promotion thus squarely states a claim.

CONCLUSION

In summary, the Court finds that the plaintiff has properly stated a claim for which relief can be granted, except with regard to his facial challenge to the selection board membership policy. A separate order consistent with this holding will issue this date.

Date:_____

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ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE